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373-893—70

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 955

DAVID GOLDWASSER, PETITIONER

v.

ROBERT C. SEAMANS, JR.,
SECRETARY OF THE AIR FORCE, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

There was no opinion of the United States District Court for the District of Columbia. The opinion of the court of appeals (Pet. A1–A17) has not yet been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1969. The petition for a writ of certiorari was filed on December 15, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government erred in the conduct of a government employee's discharge hearing before the Civil Service Commission by not compelling visiting foreign military officers to appear as witnesses on behalf of petitioner, where neither petitioner nor his counsel made any effort of their own to arrange for the officers' attendance.

2. Whether the First Amendment permits the discharge of a civilian language instructor, employed by the Air Force to teach English to visiting foreign military officers, on the ground that the instructor, in contravention of prior orders and warnings from his superior, deviated from his lesson plans to discuss matters of religion and politics.

STATUTE AND REGULATION INVOLVED

Lloyd-LaFollette Act, section 6(a), 37 Stat. 555, as amended, formerly 5 U.S.C. 652(a), currently 5 U.S.C. (Supp. IV) 7501, as in effect in all times relevant to this litigation:

> 5 U.S.C. 652. REMOVAL WITHOUT PAY FROM CLASSIFIED CIVIL SERVICE
>
> (a) *Only for cause; notice; copy of charges; time to answer; examination; record; persons exempt.*
>
> No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any

person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reasons for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person affected and to the Civil Service Commission. This subsection shall apply to a person within the purview of section 863 of this title, only if he so elects.

5 C.F.R. (1964) 772.305, as in effect at all times relevant to this litigation:

(c) *Hearing procedures.* (1). An appellant is entitled to appear at the hearing on his appeal personally or through or accompanied by his representative. The agency is also entitled to participate in the hearing. Both parties are entitled to produce witnesses but as the Commission is not authorized to subpena witnesses the parties are required to make their own arrangements for the appearance of witnesses.

STATEMENT

Petitioner was an English language instructor employed by the Air Force at Lackland Air Force Base, Texas, to teach English to visiting foreign military officers (JA 68, 69).[1] As a matter of policy, the Air Force considered the discussion of controversial subjects in the classroom by the instructors to be prejudicial to the best interests of the government. Prior to the incidents leading to petitioner's discharge, he had been officially admonished by his superior, on at least three separate occasions, for deviating from his lesson plans to discuss controversial matters relating to religion and politics (JA 96).[2] Thus, petitioner was

[1] "JA" refers to the Joint Appendix in the court below, a copy of which has been filed with this Court.

[2] Petitioner's employment folder contained the following reports by his superior (JA 96):

> 1. 6 December, 1960. Talked with Mr. Goldwasser on his deviating from the lesson. He was talking about the "Watchtower" (that he had found) and their religion. How they were imprisoned during the last war. He explained to me that the students asked about the magazine "Watchtower". I cautioned him about controversial material in the classroom.
>
> 2. 14 March, 1961. I admonished Mr. Goldwasser for discussing politics in class. He was discussing the negro problem in the South. He had taught some songs in class from Porgy and Bess. He said he was explaining these to the class. Employee was reminded of singing in class and controversial matters again.
>
> 3. 17 November, 1963. Mr. Goldwasser has been in a heated argument with a large class of Cuban students. He showed them a newspaper clipping of Castro holding a baby, and another picture of an American GI with a gun aimed on a Cuban woman in a ditch. The students were

fully aware of the Air Force policy against discussing controversial matters; indeed, he testified during his discharge hearing that "common sense dictated instructors should avoid controversial issues or matter * * *" (JA 128, 106).

In the face of this Air Force policy and the prior admonitions, petitioner was charged with having discussed controversial matters of religion and politics during classes in November and December, 1965, when the lesson plans were "At the Dentist" and "How to Test a Used Car" (JA 127). Specifically, petitioner's notice of dismissal charged that on November 23, 1965, he had discussed anti-Semitism and expounded upon discrimination against Jews, including anti-Semitism experienced by him at the Lackland Air Force Base (JA 60). The notice also charged petitioner with originating a discussion during class on December 2, 1965, about persons who burn themselves to death as a protest against the war in Vietnam, stating that such persons are the "real American heroes" and that he wished he "had enough 'guts' to do the same thing against the present Administration's policies in the war in Vietnam" (JA 61).

Based upon these two separate incidents, petitioner was discharged by the Air Force (JA 61–64). Petitioner appealed his discharge to the Civil Service

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very angry with him and Mr. Garcia and I had to calm the students.

4. 20 September, 1964. Discussed Item I. Changed to a 4 from a 5 due to Mr. Goldwasser deviating from lesson plans and singing again on 14 September, and always discussing controversial matters.

Commission, Dallas Region, where a *de novo* hearing was held (JA 69, 120–130). At the hearing, the government submitted two affidavits from petitioner's supervisor, as well as affidavits from four fellow employees, all to the effect that petitioner made the statements as charged (JA 86–92). Petitioner's defense at this hearing was that he did not make these statements (JA 108, 127). Nevertheless, petitioner did not seek to impeach the affidavits by personally attempting, or by requesting the Air Force, to produce the affiants as witnesses for cross-examination. Thus, the only testimony contrary to the evidence in the affidavits was that of petitioner himself, and testimony of character witnesses (JA 121–125). Petitioner did not assert as a defense in this hearing that he was unaware of the Air Force policy against making controversial statements in the classroom or that he was confused as to the specifics of this policy. Petitioner, through his counsel, made the following concession at the hearing:

> * * * We will have to concede initially that, just as a matter of good common horse sense, instructors in his position teaching foreign students should do their utmost to avoid controversial subjects, and there is no question but that he had been counseled to avoid controversial subjects. * * * [JA 106.]

In support of his own testimony that he did not make the statements as charged, petitioner did seek to have the visiting foreign officers to whom the statements were allegedly made, attend the hearing. In this regard, petitioner, by letters from his counsel, re-

quested that certain named students should be produced by the government at the hearing (JA 61–63, 65–66). In response to that request, petitioner was advised that the government had no power to compel the attendance of the students, for the visiting foreign officers were guests of the United States Government, not under the military jurisdiction of the United States Air Force, and therefore the government could not compel their attendance at his hearing (JA 66, 129). The petitioner was further advised, however, that he was free to contact the students directly to solicit their voluntary attendance at the hearing. To aid petitioner, the letter listed the names and addresses of the appropriate liaison officers of the respective national groups who should be contacted to solicit the cooperation of petitioner's students (JA 66–67). It is undisputed that neither petitioner nor his counsel personally made any effort to contact these students so as to arrange to have them participate in the hearing. Accordingly, none of the foreign officers taught by petitioner testified at the hearing.

The Civil Service Commission, however, did dispatch an investigator to take statements from any students voluntarily wishing to give them (JA 95). The students taught by petitioner were from Iran, Greece and Japan. The investigator met with the liaison officers from the respective groups. He explained to them the purpose of the investigation and that the students were the only persons available to substantiate the contentions of the petitioner so that any information they could supply would be vital. *Id.*

They were further advised that any testimony voluntarily given would be greatly appreciated, but that the students would not be subject to a subpoena to compel their appearance and testimony. The liaison officers indicated they were not in favor of getting their students involved in this matter but did agree to contact the respective students to ascertain whether they wished to give testimony or make an affidavit. *Id.* Only one student gave a statement to the investigator.[3] He merely stated, in an unsworn statement, that he had "no recollection" of petitioner making remarks about discrimination against Jews or about persons committing suicide by burning themselves. *Id.*

In resolving the conflict of evidence with regard to whether petitioner in fact made the statements, the hearing examiner found the record fully supported the Air Force's charges, *i.e.*, that he discussed controversial subjects with foreign students, contrary to the Air Force policy after that policy had been repeatedly explained to him (JA 151–160). Accordingly, the discharge was upheld. This decision was affirmed on administrative appeal by the Civil Service Commission's Board of Appeals and Review and the Commission itself determined not to reopen and consider the matter (JA 183–186, 192).

[3] After the completion of the discharge hearing, but before the decision was rendered, petitioner submitted an informal statement by another student to the effect that he did not hear petitioner make the statements as charged (JA 147–149). Apparently this statement was obtained by petitioner after he, by chance, met the student at a theater. The examiner considered this statement along with the rest of the evidence (JA 158).

Petitioner then commenced the present action in the United States District Court for the District of Columbia to review the administrative action upholding the discharge (JA 5–9). The district court affirmed petitioner's discharge (JA 41–42), and the court of appeals, one judge dissenting, in turn affirmed the action of the district court (Pet. A1–A17). The court of appeals rejected petitioner's contention that procedural error was committed by the Commission's failure to compel the attendance of the visiting foreign officers at the hearing. The court noted that under the applicable regulations at that time, 5 C.F.R. 772.305(c), the Commission was without subpoena power. The court acknowledged, however, that under the principles enunciated by this Court in *Williams* v. *Zuckert*, 371 U.S. 531, rehearing granted and case remanded for further proceedings, 372 U.S. 765, circumstances may arise under which the government must compel the attendance of employees at discharge hearings. However, the court found it unnecessary to determine the precise relationship of the foreign visiting officers to the Air Force so as to ascertain whether the government, in fact, had the authority to compel their attendance. Even assuming the government could have compelled the attendance, the court noted that petitioner failed to make any effort himself to obtain the presence of the foreign students—a necessary prerequisite to requiring the government to produce these students.

Similarly, the court found petitioner's contention that his discharge violated his First Amendment right

of free speech to be without merit, concluding that in light of "the uniqueness of appellant's teaching function", *i.e.*, an Air Force language instructor given specifically detailed lesson plans to teach foreign military officers, a deviation from these lesson plans to discuss controversial matters of politics and religion, in the face of prior warnings, could constitutionally provide a basis for discharge (Pet. A13).

ARGUMENT

The court below correctly applied the governing principles and further review by this Court is not warranted.

1. In *Williams* v. *Zuckert*, 371 U.S. 531, 372 U.S. 765, this Court held that under certain circumstances the government must produce its employees as witnesses at a discharge hearing. However, the initial burden of producing these employees was placed upon the discharged employee. Absent any good faith attempt on the part of the discharged employee to obtain, through his own efforts, the presence of the government employees, the government has no duty under *Williams* v. *Zuckert* to produce these employees. In the present case, it is far from clear that the visiting foreign officers sought as witnesses were persons under the control of the government that it might be compelled to produce under *Williams* v. *Zuckert*. In any event, what is clear on this record, and what the court below found, is that the petitioner failed to sustain his initial burden of seeking to ob-

tain himself the presence of the visiting officers.[4] Thus, the court quite properly found no procedural error in the conduct of the discharge hearing.

2. Similarly, petitioner's free speech claim under the First Amendment was properly rejected by the court below on the basis of *Pickering* v. *Board of Education,* 391 U.S. 563. Petitioner conceded at the Civil Service Commission hearing that he was fully aware of the Air Force policy against discussion of controversial subjects and was not confused by that policy. The Civil Service Commission found that petitioner made the statements as charged; this finding was upheld by the courts below and is not challenged here. Thus, the only remaining issue is whether petitioner may be discharged for making such statements. It is well settled that the free speech rights of a government employee are not absolute. See, *eg.*, *Pickering* v. *Board of Education, supra; United Public Workers* v. *Mitchell,* 330 U.S. 75; cf. *Schenck* v. *United States,* 249 U.S. 47, 52. In *Pickering,* this Court stated that the determination of whether a teacher could be constitutionally dismissed for free speech activities involved "a balance between the interests of the teacher, as a citizen, in commenting upon

[4] Nor is there any merit in the position that it would have been futile for petitioner to attemp to arrange for the presence of these officers. The record shows that petitioner was able to elecit a favorable statement, albeit informally, from a student that he met by chance, at a theater, after the hearing was held. This would seem to indicate that had petitioner approached this, and perhaps other students, prior to the hearing, such students might have been prevailed upon to voluntarily attend.

matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees". 391 U.S. at p. 568. The court below balanced petitioner's interest in expressing his personal views with regard to politics and religion against the interest of his employer, the Air Force, in maintaining a non-controversial, non-political, technical program of instruction in the English language for visiting foreign military officers. We submit that the First Amendment protections afforded instructors do not preclude dismissal for deviating from narrowly drawn lesson plans, in the face of prior warnings, to discuss political and other controversial matters with foreign military students. The court below weighed all these factors and correctly concluded the First Amendment did not bar petitioner's discharge.[5]

[5] The petition also noted that petitioner may be discharged only for reasons that " 'promote the efficiency' of the classified civil service." 5 U.S.C. (Supp. IV) 7501. Petitioner asserts as error the fact that there is no express administrative finding as to how petitioner's dismissal would so promote the efficiency of the service. The court below noted (Pet. A9) that the lack of such a finding is perhaps due to petitioner's failure to raise administratively the issue of whether his conduct had an adverse effect on the efficiency of service. At all events, however, it is sufficiently clear that the efficiency of the service is promoted by the discharge of an instructor, who, after prior warnings, deviates from his assigned lesson plans and discusses matters not permitted by Air Force official policy.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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